Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF NEVADA,

Petitioner,

v.

GREG R. TABBADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court correctly determined under federal law that Tabbada was in custody for purposes of Miranda merely because he was handcuffed at the crime scene, instead of determining whether Tabbada was in custody at the time police interviewed him by considering the totality of the circumstances.

2. Whether a suspect who is in custody when he is initially detained by police -- because he is handcuffed and not free to leave -- is necessarily in custody for purposes of Miranda at a later time when he is interviewed by police, where the suspect agrees to talk to police at a social services building, police tell him he is not under arrest and is free to leave, and police remove the handcuffs.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, the State of Nevada, Petitioner herein, by and through counsel, and files this Petition for a Writ of Certiorari seeking reversal of the Opinion of the Supreme Court of the State of Nevada.

OPINIONS AND JUDGMENTS BELOW

The Order Reversing and Remanding of the Nevada Supreme Court is reproduced as Appendix A. Tabbada v. State, Case No. 38805, filed April 21, 2003. The Order Denying Rehearing of the Nevada Supreme Court is reproduced as Appendix B. Tabbada v. State, Case No. 38805, filed June 18, 2003. The Order Denying En Banc Reconsideration of the Nevada Supreme Court is reproduced as Appendix C. Tabbada v. State, Case No. 38805, filed August 29, 2003.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is being filed within 90 days of the Order Denying En Banc Reconsideration of the Nevada Supreme Court, filed on August 29, 2003. Sup. Ct. R. 13. The jurisdiction of the Court is invoked under 28 U.S.C. 1257.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

On February 13, 2001, a police dispatcher received a call from a young child who stated she had been raped by her babysitter. Appendix D, 3. When police arrived at the child's residence, they interviewed the child inside her home, while Officer Daniel Parker went outside with Tabbada. Id. at 4. Officer Parker handcuffed Tabbada "because of the nature of the crime" and the officer's concern whether Tabbada would leave. Id. at 5. However, Officer Parker told Tabbada he was not under arrest. Id. Tabbada told the officer he understood. Id. Officer Parker then put Tabbada in his police car because it was cold outside and Tabbada did not have a coat. Id. at 8-9. Tabbada was handcuffed in the police car pursuant to department policy for the protection of the officer and Tabbada. Id. at 7-8.

Officer Parker asked Tabbada whether he would go to the police station to talk to a detective about the case. Appendix E, 8-9. Tabbada agreed and asked whether the officer could give him a ride. Id. at 12. The officer said he could. Id.

Officer Parker and Tabbada drove to a county social services building where the handcuffs were taken off. Appendix D, 14-15, 18. Detective Michael Tone, dressed in casual clothing, told Tabbada he was not under arrest, and that

Tabbada was voluntarily at the building. Id. at 15, 16. Tabbada stated he understood, and told the detective he wanted to talk about the case. Id. at 15.

Detective Tone and Tabbada went into an interview room. Id. at 17. There were no signs or indicia that the building was used in any way for police activities. Id. Detective Tone asked Tabbada if he was comfortable and wanted a glass of water, and then left to interview the victim. Id. at 20, 24.

Detective Tom Broome, also dressed in casual clothes, then entered the room. Id. at 27-28. Detective Broome told Tabbada he was not under arrest and "was free to leave at any time." Id. at 28. Tabbada again acknowledged that he understood. Id. After he made certain admissions, Tabbada told the detective he was going "to go pick up my sister." Appendix F, 2. Detective Broome told Tabbada he was then under arrest. Id. at 3.

Tabbada filed a motion in the trial court to suppress the admissions he made to Detective Broome. In considering the relevant factors under Nevada case law, the trial court judge ruled certain facts favored the finding of a custodial setting: The police moved Tabbada, while handcuffed, to a police-dominated interview. Appendix D, 38. On the other hand, the trial judge found police did not use "strong-arm or deceptive tactics[.]" Id. The trial judge also found the police informed Tabbada "this was a voluntary talking to the police and that he was free to go[.]" Id. at 39. The trial judge found Tabbada was not going to be kept at the interview and arrested regardless of the interview. Id. The trial judge further found Tabbada was "free to move about during the questioning" and

"was not formally under arrest." Id. at 40. The trial judge noted Tabbada was not handcuffed during the interview. Id. at 41. The trial judge noted Tabbada "certainly volunteered to go to the police station and wasn't coerced to go there." Id. Finally, the trial judge found that Tabbada responded to questions voluntarily. Id. at 40. Based on the totality of the circumstances, the trial judge ruled that Tabbada was not in custody at the time of the interview and therefore not entitled to a Miranda warning. Id. at 41.

A jury convicted Tabbada of lewdness with a child under the age of fourteen and indecent exposure. Appendix A. On appeal, the Nevada Supreme Court, in a 2-1 decision, reversed the trial court's finding and remanded the case. The court found that Tabbada was "'in custody' the moment he was placed in handcuffs[,]" so that police officers should have advised Tabbada of his Miranda rights before they questioned him. Exhibit A, 6. The court also ruled that Tabbada's custodial status did not revert to a non-custodial one after the handcuffs were taken off and Tabbada was told he was not under arrest and could leave at any time. Id. at 6-8.

REASONS FOR GRANTING THE WRIT

I

THE NEVADA SUPREME COURT HAS DETERMINED FEDERAL LAW HOLDS THAT WHERE THERE IS NO EVIDENCE A SUSPECT IS DANGEROUS OR MIGHT FLEE, HANDCUFFING, BY ITSELF, RESULTS IN A CUSTODIAL SETTING FOR PURPOSES OF MIRANDA;

THE FEDERAL COURTS HOLD OTHERWISE.

"In the Fifth Amendment context, [this Court has] . . . created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." Chavez v. Martinez, 123 S.Ct. 1994, 2003 (2003). Accordingly, a suspect subjected to a custodial interrogation must be advised of and knowingly and intelligently waive his Miranda rights; otherwise, the suspect's responses cannot be introduced into evidence to establish his guilt. See Miranda v. Arizona, 530 U.S. 428, 431-32 (1966).

Here, the Nevada Supreme Court, citing the Ninth Circuit and case law from New Hampshire and Pennsylvania,[1] held that "when there is no indication that the suspect is dangerous or might flee, courts have determined that there is no justification for handcuffing the suspect, and therefore, the suspect was 'in custody.'"[2] Appendix A, 4. The Nevada Supreme Court noted that in this case "there was no evidence that Tabbada was particularly dangerous once the officers

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[1]U.S. v. Del Vizo, 918 F.2d 821, 825 (9th Cir. 1990); State v. Lescard, 517 A.2d 1158, 1159 (N.H. 1986); Comm. v. Medley, 612 A.2d 430, 433 (Pa. 1992).

[2]Citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977), the Nevada Supreme Court acknowledged that in determining whether one is in custody, "'the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" Appendix A, 3. Citing Nevada case law, which in turn quotes Berkemer v. McCarty, 468 U.S. 420, 422 (1984), the Nevada Supreme Court explained that "the restraint on freedom of movement" question turns on ""'how a reasonable man in the suspect's position would have understood his situation.'"" Id.

arrived[,] and "there was no evidence that Tabbada attempted to leave[.]" Id. at 5. The Nevada Supreme Court thus ruled that "Tabbada was 'in custody' the moment he was placed in handcuffs." Id. at 6.

This Court should grant the State's petition because there is no federal authority supporting the idea that handcuffing, by itself, necessarily results in a custodial situation, even where there is no indication the suspect is dangerous or might flee.[3] This Court should declare that under the Federal Constitution, the question of whether one is in custody for purposes of Miranda is governed by the totality of the circumstances, and that the trial court determines the weight to be given each of the various factors used in deciding the custody question, with no one factor controlling--even where a suspect is handcuffed and placed in a police car. See e.g., United States v. Bennett, 329 F. 3d 769, 775 n.3 (10th Cir. 2003)(noting that where police initially use firearms and handcuffs to restrain an individual Miranda does not apply where the suspect is told he is not under arrest and freed of any restraint during questioning); United States v. Cota, 953 F.2d 753, 758-59 (2d Cir. 1992)(question of custody for purposes of Miranda governed by totality of circumstances;

[3]While the Nevada Supreme Court ruled there was no justification in handcuffing Tabbada, Officer Parker handcuffed Tabbada in response to the report of a violent crime: the rape of a nine-year old child. Handcuffing in such a situation is justified under federal authority. See Washington v. Lambert, 98 F.3d 1181; 1189 (9th Cir. 1996)(use of force in Terry stops may be justified "where the stop closely follows a violent crime."); Hicks v. United States, 730 A.2d 657 (D.C. App. 1999)(handcuffing proper when police responding to the violent crime of "robbery").

officers' initial use of guns and handcuffs to restrain defendant did not subject defendant to custodial interrogation where the handcuffs were removed after the security threat abated); United States v. Prince, 157 F.Supp.2d 316, 324-325 (D. Del. 2001)(whether one is in custody is determined by the totality of the circumstances; suspect who was handcuffed and placed in a police car was not in custody given the circumstances of the case).[4]

Here, the Nevada Supreme Court gave paramount and exclusive consideration to the fact that Tabbada was handcuffed without justification. The trial court, on the other

[4]Reference to Fourth Amendment case law regarding what constitutes an arrest is also helpful. See e.g., United States v. Glenna, 878 F.2d 967, 972 (7th Cir. 1989)("We are unwilling to hold that under Terry, the placing of a suspect in handcuffs without probable cause to arrest is always unlawful."); United States v. Del Vizo, 918 F.2d 821, 824 (9th Cir. 1990)(holding that "the fact that the officers handcuffed a suspect does not in itself, automatically escalate a stop into an arrest"; whether a suspect is under arrest is governed by the totality of the circumstances); Washington v. Lambert, 98 F.3d 1181, 1186 (9th Cir. 1996)("[P]ointing a weapon at a suspect and handcuffing him, or ordering him to lie on the ground, or placing him in a police car will not automatically convert an investigatory stop into an arrest that requires probable cause."); United States v. Blackman, 66 F.3d 1572, 1576 (11th. Cir. 1995)("this Court has said the fact that police handcuff the person or draw their weapons does not, as a matter of course, transform an investigatory stop into an arrest."); People v. Carlos M., 269 Cal. Rptr. 447, 454-55, 220 Cal. App. 3d 372, 385 (1990)("The fact that a defendant is handcuffed while being detained does not, by itself, transform a detention into an arrest."); Morris v. State, 50 S.W.3d 89, 94 (Ct. App. Tex. 2001)("Numerous cases hold that the mere handcuffing of a suspect does not automatically transform an investigative stop into a full blown arrest.").

hand, used the correct standard by weighing various factors, and then decided, given the totality of the circumstances, that Tabbada was not in custody at the time he was questioned by the police. Accordingly, this Court should reverse the Nevada Supreme Court and reinstate the trial court's order denying Tabbada's motion to suppress.

II

THE NEVADA SUPREME COURT HAS ERRED BY RULING THAT A DEFENDANT'S CUSTODIAL STATUS MAY NOT EVOLVE INTO A NON-CUSTODIAL STATUS.

Before the Nevada Supreme Court, the State argued that even if Tabbada was initially in custody when he was handcuffed, he was not in custody when he was interrogated later by Officer Broome. Appendix A, 6. The State pointed out that when Tabbada arrived at the social services building the handcuffs were taken off, and before he was interrogated, Tabbada was told several times he was not under arrest and was free to leave at any time. Id. In response, the Nevada Supreme Court, citing United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982), ruled that "courts have been skeptical that any such transformation [from custody to non-custody] can so readily occur."[5] Appendix A, 7. That ruling was error.

Given that the question of whether one is in custody--

[5]The Nevada Supreme Court also discusses United States v. Guarino, 629 F. Supp. 320, 322-23 (D. Conn. 1986), for the idea that a defendant's custodial status does not change to a non-custodial one during his contact with police.

for purposes of Miranda--is relevant only when one is interrogated, this Court should rule that a defendant's custodial status may change according to the circumstances that unfold from the defendant's first encounter with police until his custodial interrogation. The federal cases cited by the Nevada Supreme Court do not support the proposition that a custodial hold on a defendant may not revert to a non-custodial setting. For example, in Lee, cited by the Nevada Supreme Court, the Ninth Circuit did not hold a custodial setting may not revert to a noncustodial one. Rather, the court merely held that, under the totality of the circumstances, a reasonably innocent person could conclude, under the facts of that case, he was not free to leave. Id. at 468. The court noted although the defendant was told he was free to leave or terminate an interview with FBI agents at any time, the district court's ruling that the defendant was in custody was not clearly erroneous where the defendant "was questioned in a closed FBI car with two officers for well over an hour while police investigators were in and around his house[,]" and the agents "confronted him with evidence of his guilt, and told him it was time tell the truth[.]" Id.

In United States v. Guarino, 629 F.Supp. 320, 322-23 (D. Conn. 1986), also cited by the Nevada Supreme Court, the court did not address whether a custodial situation might at some point become non-custodial. The court did hold that under the circumstances of that case, the "restraint on defendant's freedom of movement or his otherwise custodial situation, however, did not end when his handcuffs were later removed." Id. at 324. The court reached this conclusion based on several things: the defendant's brother, "also

handcuffed, was segregated from the defendant and felt it necessary to ask permission of an agent to leave the kitchen and wind an alarm clock[]"; "[v]arious F.B.I. agents and a Drug Enforcement Agency agent constantly wandered in and around the Guarino premises and when the phone rang, the Guarinos did not feel they were free to answer it[]"; agents stayed in the defendant's home without a search warrant; and "[t]he defendant was questioned throughout the evening and at no point was he unaccompanied by agents." Id. at 325. In other words, the defendant was still in custody after his handcuffs were removed because of the particular facts of that case. However, neither Guarino nor Lee, support the idea that a custodial setting may not become non-custodial for purposes of Miranda.

People v. Joseph R., 65 Cal.App.4th 954, 76 Cal.Rptr.2d 887 (1998), on the other hand, does support the idea that a custodial setting may revert to a non-custodial one. There, the court stated,

> As the court in People v. Taylor, 178 Cal.App.3d 217, 223 Cal.Rptr. 638 (1986) explained in a similar context, "For Miranda purposes, we think the crucial consideration is the degree of coercive restraint to which a reasonable [person] believes he is subject at the time of questioning. Police officers may sufficiently attenuate an initial display of force, used to effect an investigative stop, so that no Miranda warnings are required when questions are asked. Thus, for example, a police officer may well act reasonably in drawing his gun while he approaches a [person] in an uncertain situation. However, . . . the officer may also reholster it. (See United States v. Harley, 682

> F.2d 398, 400 (2d Cir.1982). Assuming the [person] is subject to no other restraints, the officer's initial display of his reholstered weapon does not require him to give Miranda warnings before asking the [person] questions."

Id. at 960-61, 76 Cal.Rptr.2d at 891 (emphasis in original).

In Joseph R., a police officer approached a minor about throwing a rock at a bus. When the minor claimed ignorance, the officer placed him in handcuffs and told him to sit in the patrol car. Id. at 957, 76 Cal.Rptr.2d at 889. The minor was in the patrol car for about five minutes when the officer returned, took the minor out of the car, removed the handcuffs, and started asking questions about the incident. Id. The minor later claimed his admission was inadmissible since he had not received a Miranda warning. Id. The court found the minor's statement was not the product of a custodial interrogation because the questions "were only put to Joseph after he was released from the police car and the handcuffs were removed." Id. (emphasis in original). The court further noted had the minor been interrogated while in the police car, he would have been in custody for purposes of Miranda. Id. at 958 n.5, 76 Cal.Rptr.2d at 890 n.5.

Joseph R. properly recognizes it is possible a custodial setting may evolve into a non-custodial one because of intervening circumstances. The Tenth Circuit and the Second Circuit seem to agree. See United States v. Bennett, 329 F. 3d 769, 775 n.3 (10th Cir. 2003)(noting that where police initially use firearms and handcuffs to restrain an individual Miranda does not apply where the suspect is told he is not under arrest and freed of any restraint during questioning); United States v. Cota, 953 F.2d 753, 758-59 (2d Cir. 1992)(question of custody for purposes of Miranda governed by totality of circumstances; officers' initial use of guns and handcuffs to restrain defendant did not subject defendant to custodial interrogation where the handcuffs were removed after the security threat abated). That happened in this case. Although the Nevada Supreme Court also looked at the specific facts of this case in finding that Tabbada's custodial

situation had not changed at the time of his interrogation, the Court relied on improper reasons in its analysis. For example, the Nevada Supreme Court noted that "Tabbada did not have any means to return home because he was brought to the police substation in the police car." Appendix A, 8. The record, however, does not support the idea Tabbada had no way to get home. The Nevada Supreme Court also noted "Tabbada felt it necessary to ask permission to leave, though he was then told that he was under arrest." Id. However, Tabbada's subjective thought process is irrelevant to the custody question. See Stansbury v. California, 511 U.S. 318, 322, (1994)(a suspect's or officer's subjective view of the situation is not determinative whether a suspect is in custody.).

This Court has previously explained that a suspect's contact with police can evolve from a consensual encounter into a de facto arrest. See California v. Hodari D., 499 U.S. 621, 639 (1991)("What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment[.]"). There is no logical reason to believe the reverse is not true as well. Accordingly, this Court should grant the State of Nevada's petition to determine the constitutional issue of whether a defendant's custody may become non-custodial prior to questioning for purposes of Miranda.

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CONCLUSION

For the reasons stated above, petitioner asks that a writ of certiorari to the Nevada Supreme Court issue and that the decision of the Nevada Supreme Court be reversed.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG R. TABBADA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondents.

No. 38805

Filed:
April 21, 2003

ORDER REVERSING AND REMANDING

Greg R. Tabbada appeals from a judgment of conviction entered after a jury found him guilty of lewdness with a child under the age of fourteen and indecent exposure. Tabbada challenges his conviction on two grounds: (1) whether the district court erred in admitting the child victim's videotaped statement; and (2) whether the district court erred in denying Tabbada's motion to suppress his pre-arrest statements. We conclude that the district court did not abuse its discretion in admitting the child victim's videotaped statement. But, we conclude that the district court erred in failing to suppress Tabbada's pre-arrest statements; therefore, we reverse his conviction and remand this case for a new trial.

Tabbada first contends that the district court erred in admitting the child victim's videotaped statement. Specifically, Tabbada argues that the child victim's statement was cumulative and that it was more prejudicial than probative. NRS 51.385 permits the admission of a statement made by a child victim under the age of ten years. In Felix v. State,[1] we

[1]109 Nev. 151, 200, 849 P.2d 220, 253 (1993), modified on other

stated that additional heresay statements under NRS 51.385 should be restricted once the child sexual assault victim's accusations "have been fairly presented by one or more witnesses as to the time, the place, and the incident and any challenges to the victim's credibility are fairly met."[2] Unlike the six recounted accusations in Felix, in this case the State only introduced one recount, the child victim's videotaped statement.

Although the child victim testified, the child victim failed to recall some details of the incident that the child victim had told the detective during the interview shortly after the incident. Thus, we conclude that the admission of the child victim's videotaped statement did not rise to the level of cumulative error as in Felix. Accordingly, we conclude that the district court did not abuse its discretion in this instance.[3]

Tabbada next contends that the district court erred when it denied his motion to suppress his pre-arrest statements. Tabbada argues that he was "in custody" from the moment he was placed in handcuffs and subsequently taken to the police substation where he made incriminating statements.

We have acknowledged that, under Miranda v.

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grounds by Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001).

[2]Id.

[3]See Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000)(noting that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed on appeal unless manifestly wrong).

Arizona,[4] "a suspect may not be subjected to an interrogation in official 'custody' unless that person has previously been advised of, and has knowingly and intelligently waived [his or her constitutional rights]."[5] The United States Supreme Court has provided that "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[6] Accordingly, we have provided that the test for determining whether a defendant who has not been arrested is in custody "'is how a reasonable man in the suspect's position would have understood his situation.'"[7]

In analyzing the custody issue, the court must consider the totality of the circumstances, and although no single factor is dispositive, the following facts are important in this analysis:

(1) the site of the interrogation,

(2) whether the investigation has focused on the subject,

(3) whether the objective indicia of arrest are present, and

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[4]384 U.S. 438 (1966).

[5]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996).

[6]Oregon v. Mathiason, 429 U.S. 492, 495 (1977)(internal quotations and citation omitted), quoted in Stansbury v. California, 511 U.S. 318, 322 (1994).

[7]Alward, 112 Nev. at 154, 812 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 422 (1984)).

(4) the length and form of questioning.[8]

Notably, a suspect's or officer's subjective view of the circumstances is irrelevant in the custody inquiry.[9]

The record reveals that the site of the interrogation does not appear to have been coercive in nature, and the length of questioning was not extensive. And, it is undisputed that the investigation of the incident focused on Tabbada. But, Tabbada contends that the objective indicia of arrest were clearly present, given that he was placed in handcuffs, placed in the police car, and taken to the police substation.

First, Tabbada asserts that handcuffing him was not justified. The Ninth Circuit has provided that "handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention," but "police conducting on-the-scene investigations involving potentially dangerous suspects may take precautionary measures if they are reasonably necessary."[10] The Ninth Circuit has noted that the purpose of the precautionary measures "is 'to allow the officer to pursue

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[8]Id. at 155, 912 at 252 (placed in list format).

[9]See State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998); see also Stansbury, 511 U.S. at 323.

[10]United States v. Baustista, 684 F.2d 1286, 1289 (9th Cir. 1982); accord United States v. Thompson, 597 F.2d 187, 190 (9th Cir. 1979)(concluding that it was reasonable to handcuff the defendant because he had "repeatedly attempted to reach for his inside coat pocket, despite the officers' repeated warnings not to").

his investigation without fear of violence.'"[11] However, when there is no indication that the suspect is dangerous or might flee, courts have determined that there is no justification for handcuffing the suspect, and therefore, the suspect was "in custody."[12]

The State contends that Officer Daniel Joseph Parker was justified in handcuffing Tabbada because of the nature of the crime--the child victim called 911 alleging that she had been raped--and because Officer Parker was concerned that Tabbada would leave. But, there was no evidence that Tabbada was particularly dangerous once the officers arrived. Indeed, Officer Parker did not place Tabbada in handcuffs

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[11]Bautista, 684 F.2d at 1289 (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)); accord U.S. v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995)(concluding that agents' handcuffing of the four suspects was not unreasonable in light of the violent nature of the robberies); U.S. v. Glenna, 878 F.2d 967, 973 (7th Cir. 1989)(concluding that the officers' handcuffing of the defendant was reasonable in light of information that the defendant was armed and dangerous).

[12]See U.S. v. Del Vizo, 918 F.2d 821, 825 (9th Cir. 1990)(concluding that there was no justification for handcuffing the defendant because there was no evidence that the defendant failed to comply with the officers' orders or that the defendant was particularly dangerous, especially once he had stepped out of the van, had been frisked and was lying on the ground"); State v. Lescard, 517 A.2d 1158, 1159 (N.H. 1986)(concluding that the defendant was in custody because he was handcuffed at the accident scene and was attended by a police officer while at the hospital); Comm. v. Medley, 612 A.2d 430, 433 (Pa. 1992)(concluding that appellant was in custody, as he was frisked, handcuffed without any indication that he was dangerous, transported to the police station, and placed in a secured waiting area until being interrogated).

immediately after his arrival, but waited ten to fifteen minutes. Also, there was no evidence that Tabbada attempted to leave; but to the contrary, the evidence established that Tabbada cooperated and complied with Officer Parker's orders.

Second, Tabbada contends that Officer Parker was not justified in placing him in the police car. The Ninth Circuit has provided that "there is no per se rule that detention in a patrol car constitutes an arrest."[13] In United States v. Torres-Sanchez,[14] the Ninth Circuit concluded that Sanchez' twenty-minute detention in the police car was reasonable. In so concluding, the court reasoned that Sanchez was never required to sit in the police car, but the officers suggested it to him because of the cold weather.[15] And, Sanchez was never removed from the scene or driven around in the police care; but instead, Sanchez voluntarily entered the police car and was free to leave after he answered routine questions.[16]

Here, Officer Parker handcuffed Tabbada outside the house and questioned him for almost a half hour. Although Officer Parker testified that he placed Tabbada in the police car because it was cold, he waited at least fifteen to twenty minutes to do so. Also, Officer Parker did not suggest this; rather, he told Tabbada that he was placing him in the police car because of the weather. Tabbada did ask Officer Parker if the police would give him a ride to the police substation,

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[13]U.S. v. Parr, 843 F.2d 1228, 1230 (9th Cir. 1988).

[14]83 F.3d 1123, 1129 (9th Cir. 1996).

[15]Id.

[16]Id.

but his occurred while Officer Parker was placing Tabbada in the police car and after Tabbada had been handcuffed for at least fifteen minutes.

We conclude that Tabbada was "in custody" the moment he was placed in handcuffs. Granted, Officer Parker informed Tabbada that he was not under arrest, but was being detained. However, we conclude that a reasonable person in Tabbada's situation--handcuffed and placed in the police car, even though he complied with Officer Parker's order and clearly was cooperating with the officers--would have understood he was "in custody."

Alternatively, the State contends that Tabbada was not "in custody" at the time he was interviewed because the handcuffs were removed and Tabbada was informed several times that he was free to leave. We fail to see Tabbada's status change from "custodial" to "noncustodial" when the handcuffs were removed at the police substation and when he was told he was not under arrest and was free to leave at any time. In fact, courts have been skeptical that any such transformation can so readily occur.[17]

For example, in United States v. Guarino,[18] the defendant was handcuffed for about twelve minutes while federal agents raided his home as part of a narcotics

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[17]See e.g., United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982)(upholding the district court's finding that the defendant was "in custody" and was unlawfully interrogated despite the fact that the defendant was not forced into the FBI car and was told he was free to leave or terminate the interview).

[18]629 F. Supp. 320, 322-23 (D. Conn. 1986).

investigation. After removing the handcuffs, the agents stayed in the house, ultimately asking the defendant what was inside a black bag, and the defendant respondent that it contained cocaine.[19] Although the defendant's handcuffs were removed twenty minutes before he made the incriminating statement, the court found the statement was obtained in violation of the defendant's Miranda rights:

> Clearly, a reasonable person in defendant's situation, handcuffed with his hands behind his back and surrounded by armed agents, would have understood he was "in custody[.]" The restraint on defendant's freedom of movement or his otherwise custodial situation, however, did not end when his handcuffs were later removed.[20]

Likewise here, we conclude that Tabbada's custodial situation did not end when his handcuffs were removed and when he was told that he was not under arrest and was free to leave at any time. Tabbada did not have any means to return home because he was brought to the police substation in the police car. Detective Broome continued to press Tabbada until he made incriminating statements. Tabbada felt it necessary to ask permission to leave, though he was then told that he was under arrest.

Therefore, we conclude that substantial evidence does not support the district court's finding that Tabbada was not

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[19]Id. at 323.

[20]Id. at 324 (emphasis in original).

"in custody."[21]

Accordingly, we

ORDER the judgment of the district court be REVERSED AND REMANDED to the district court for proceedings consistent with this order.

s/Rose _____, J.
Rose

s/Maupin _____, J.
Maupin

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
Washoe County Public Defender
Washoe District Court Clerk

[21]See Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817 (1998)(upholding a district court's determination regarding whether the defendant was "in custody" if it is supported by substantial evidence), overruled on other grounds by Sharma v. State, 118 Nev. __, 56 P.3d 868 (2002).

GIBBONS, J., dissenting in part:

I would affirm the decision of the district court in its entirety. We will not reverse a district court's determination that a defendant was not "in custody" if the decision is supported by substantial evidence.[1] Substantial evidence is defined as "'that evidence which a reasonable mind might accept as adequate to support a conclusion.'"[2] The decision of the district court that Tabbada was not "in custody" when his pre-arrest statements were made was supported by substantial evidence.

Previously, we concluded that "[a]n individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process,[3] or where the individual questioned is merely the focus of a criminal investigation."[4] In addition, the test we set forth for determination of custody "'is how a reasonable man in the suspect's position would have understood his situation.'"[5] Neither the police officer's nor the suspect's belief regarding custody is determinative.[6] While "no

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[1]Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817 (1998)(citing Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996)).

[2]State v. McKellips, 118 Nev. __, __, 49 P.3d 655, 659 (2002)(quoting Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994)).

[3]State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998)(citing Garcia v. Singletary, 13 F.3d 1487, 1489 (11th Cir. 1994)).

[4]Id. (citing U.S. v. Jones, 21 F.3d 165, 170 (7th Cir. 1994)).

[5]Alward, 112 Nev. at 154, 912 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

[6]Taylor, 114 Nev. at 1082, 968 P.2d at 323 (citing Stansbury v. California, 511 U.S. 318, 323 (1994)).

single factor is dispositive,"[7] we consider "the totality of circumstances, including: (1) the site of interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form or questioning."[8]

The majority concedes that the interrogation site was not coercive and the length of questioning was not excessive. Our divergence begins with the precautionary handcuffing of Tabbada at the scene of the crime. Tabbada was a suspect in the molestation of a nine-year-old girl. Justification existed to handcuff Tabbada during his detention. Consistent with the United States Court of Appeals for the Ninth Circuit, this did not place Tabbada in custody.[9] The majority acknowledges "that the purpose of the precautionary measures 'is "to allow the officer to pursue his investigation without fear of violence."'"[10]

The majority also finds no justification for placing Tabbada inside a police car. However, the majority seemingly disregards the very opinion cited in support of its contention.[11] To wit, in United States v. Torres-Sanchez, the suspect voluntarily sat in the car because it was cold outside. The suspect remained in the car at the scene during his detention. The Ninth Circuit concluded the suspect was not in custody.

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[7]Alward, 112 Nev. at 154, 912 P.2d at 252 (citing California v. Beheler, 463, U.S. 1121, 1125 (1983)).

[8]Mitchell, 114 Nev. at 1423, 971 P.2d at 818 (citing Alward, 112 at Nev. 154-55, 912 P.2d at 252).

[9]See United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982)(explaining that police may take "precautionary measures if they are reasonable necessary" regarding "potentially dangerous suspects.").

[10]See majority opinion ante p.4 (quoting Bautista, 684 F.2d at 1289)(quoting Adams v. Williams, 407 U.S. 143, 146 (1972)).

[11]U.S. v. Torres-Sanchez, 83 F.3d 1123, 1129 (9th Cir. 1996).

Tabbada requested police give him a ride to the police substation. The handcuffs, placed on Tabbada as per departmental policy, were removed once Tabbada arrived at the police station. No police department signs were visible in the police substation and, with the exception of the two officers who brought Tabbada to the substation, there were no uniformed police officers walking around. Before questioning began, Tabbada was advised he was not under arrest and was at the police station voluntarily. When asked if he wanted to speak with police, Tabbada responded affirmatively. Notably, Tabbada denied raping Ashly before being asked any questions.

Before the interview began, Tabbada was advised a second time that he was not under arrest and was free to leave at any time. After one hour of questioning, Tabbada invoked his constitutional rights, and the police immediately ceased questioning him. The police did not use coercion or deception. In addition, Tabbada was repeatedly told he was free to leave, his movements were unrestrained, and the atmosphere was not police dominated. These factors suggest a reasonable person would not have thought he was in custody. Therefore, I conclude substantial evidence existed to support the district court's determination that Tabbada was not "in custody" during the initial interview at the police substation.

s/Gibbons, J.
Gibbons

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG R. TABBADA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondents.

No. 38805

Filed:
June 18, 2003

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

IT IS SO ORDERED.

s/Rose, J.
Rose

s/Maupin, J.
Maupin

s/Gibbons, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG R. TABBADA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondents.
_____/

No. 38805

Filed:
August 29, 2003

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

s/Agosti, C.J.
Agosti

s/Shearing, J.
Maupin

s/Rose, J.
Rose

s/Leavitt, J.
Leavitt

s/Becker, J.
Becker

s/Maupin, J.

s/Gibbons, J.

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

APPENDIX D

CODE: 4185
DEBBIE VIEIRA, CCR #351
Vieira Court Reporting,LLC.
333 S. Arlington Avenue
Reno, Nevada 89501
775 337-2000
Court Reporter

SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

--o0o--

THE STATE OF NEVADA,
Plaintiff,
v
GREG RAMBAC TABBADA,
Defendant.

Case No. CR01-0919
Dept. No. 10

Filed March 1, 2002

Motion To Suppress
August 2nd, 2001

APPEARANCES:
THE HONORABLE STEVEN P. ELLIOTT, DISTRICT COURT JUDGE
FOR THE PLAINTIFF: KELLI ANNE BELL, ESQ.
Deputy District Attorney
75 Court Street
Reno, Nevada

FOR THE DEFENDANT: RYAN HALL, ESQ.
Deputy Public Defender
One South Sierra Street
Reno, Nevada

THE DEFENDANT: GREG RAMBAC TABBADA

. . .

DANIEL JOSEPH PARKER,
called as a witness on behalf of the State,
first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BELL:

Q Good afternoon, sir. Please state your name and spell it into the record.

A Daniel Joseph Parker. P-a-r-k-e-r, for the last name.

Q Sir, where are you currently employed?

A Reno Police Department?

Q In what capacity.

A As a police officer for the last 11 and a half years.

Q Before that, do you have any previous police, law enforcement experience?

A With Reno Police Department, I was a reserve officer for a year.

Q Now, were you on duty February 13th, 2001?

A Yes, I was.

Q And did you have occasion to be dispatched to

the area of 429 and a half Wonder Street, Reno, Washoe County, Nevada?

A Yes, I did.

Q Now, what information did you have when you arrived at that residence?

A From our dispatcher, who received a call of a young child calling and saying she'd been raped by her babysitter.

Q When you arrived at the residence, what's the first thing that you saw?

A Upon my arrival, I observed a young child through the front living room window talking on the phone, and I motioned for her to meet me at the front door.

Q And did she do that?

A Yes, she did.

Q When she opened the door, what did you see?

A When she opened the front door, I stepped inside and I saw the child there and also a Filipino male sitting on the couch, and I asked her if this was the babysitter, and she stated to me that he was.

Q Do you see that Filipino male seated here, in the courtroom, today?

A Yes, I do.

Q Could you please describe where he's seated and what he's wearing.

A He's seated at defense table, and he's wearing a light green shirt.

MS. BELL: For the record, the witness has just identified Mr. Greg Tabbada.

THE COURT: I will confirm that.

BY MS. BELL:

Q When you -- After you asked her if this was the babysitter, what, if anything, did you do?

A I had Mr. Tabbada stand up and move to the center of the room where I made contact with him, and then I had the victim, you know, the young child who had called us, move up to the side of the room where she met with Officer Dougherty, who arrived very shortly, and Officer Mayer.

Q When you asked Mr. Tabbada to go into the center of the living room, did he say anything to you at that time?

A Yes. He stated that he had not raped the child.

Q Had you discussed with him that you thought he had committed a rape at that point?

A No. I had not.

Q Sir, what did you do after you moved him, after you separated the parties?

A I had Mr. Tabbada step outside with me where he sat down on the front porch.

Q What occurred after you took him outside and he sat down on the front porch?

A Officer Dougherty and Officer Mayer were inside interviewing the young child, and I was speaking with Mr. Tabbada outside.

Q At that point, was he in handcuffs?

A No. He was not.

Q And at that point, had you told him whether or not he was under arrest?

A No. I told him he was just being detained at

this time.

Q But you had not handcuffed him at that point?

A No. I just -- I had him step outside with me and had him sit down on the porch.

Q Sir, how long do you think he stayed outside with you?

A Totally, before we transported?

Q Yes.

A Approximately a half hour or so.

Q At some point during that half-hour period of time, did you put Mr. Tabbada into handcuffs?

A Yes, I did. It was approximately fifteen minutes or so from when we arrived on scene.

Q And what was your purpose for doing so?

A My purpose was, because of the nature of the crime and myself being outside with Mr. Tabbada, that I just placed him in the handcuffs at that time.

Q Did you have concerns as to whether he could leave?

A Yes, I did.

Q When -- When you put the handcuffs on Mr. Tabbada, what did you say to him about why you were putting the handcuffs on him, if anything?

A I informed him that he was not under arrest, that he was just being detained at this time.

Q Did he appear to understand that?

A Yes, he did.

Q Did he acknowledge that he understood that?

A Yes.

Q After you placed the handcuffs, did you

continue to engage in conversation with Mr. Tabbada?

A Yes, I did.

Q And for what purpose?

A I usually will speak with people that I'm, you know, dealing with, and just to keep them calm and myself calm in just keeping a conversation with them.

Q Officer, do you remember whether or not you told him the reason you were talking to him?

A Yes.

Q What did you tell him that reason was?

A I told him that the young girl had made allegations of inappropriate behavior on himself with her, and --

Q Did you tape record the substance of this conversation?

A Yes, I did.

Q And have you had a chance to listen and to review that tape?

A Yes, I have.

MS. BELL: May I approach your clerk, Judge?

THE COURT: Yes, you may.

(Exhibit No. 1 was marked for identification.)

BY MS. BELL:

Q Sir, I'm showing you what's been marked for identification as State's Exhibit 1.

MS. BELL: For the record, I've shown it to the defense attorney.

BY MS. BELL:

Q Sir, will you take a look at that and tell me if you recognize what that is.

A Yes. This is the recording of the tape that I recorded that night.

Q Have you had a chance to listen to it since that night?

A Yes, I have.

Q And does it fairly and accurately depict the events of that night?

A Yes, it does.

MS. BELL: At this time, I move the admission of the tape into evidence.

THE COURT: Any objection?

(Tape playing.)

THE COURT: Let's turn it off for a moment.

MS. BELL: I will, Judge. I just couldn't get over here fast enough.

MS. HALL: For the purposes of this hearing, I don't.

MS. BELL: And that's the only purpose the State is seeking its admission at this time.

THE COURT: All right. It will be admitted for purposes of this hearing.

(Exhibit No. 1 was admitted into evidence.)

(Tape Playing.)

BY MS. BELL:

Q Officer, did you in fact keep the handcuffs on Mr. Tabbada when he went into your car?

A Yes.

Q Why did you do that?

A It's department policy, that when we transport adults, that they are handcuffed inside the vehicle.

Q Do you know what that's for?

A It's for their protection, as well as ours.

Q Is that the same reason you searched him?

A Yes. Anybody that I transport, I always search.

Q At the end of the tape there you're heard saying to somebody, "It's no big deal; just a misunderstanding." What are you saying that for?

A There was a neighbor that came over that was concerned because of the police vehicles there, and I didn't want him to know the allegations of the child. Being that he knew who this child was, I didn't want that rumor going out into the neighborhood.

Q But Mr. Tabbada was there when you said that?

A Yes.

Q You said, "That's okay. I'll loosen them." What were you speaking about?

A The handcuffs.

Q And why did you loosen them up?

A Because he complained that they were tight.

Q When you and Mr. Tabbada were speaking about his car, what is it that you were doing physically during that time?

A Well, I asked him if his vehicle was there. He said, "Yes." I asked him to show me where it was. He stepped down, walked out in the parking lot -- or in front of the apartment there. He looked around, and that's when he realized the vehicle wasn't there.

Q And the reason that he was put in the car at

that point was for warmth?

A Yes.

Q Because he didn't have a coat?

A Correct.

Q And as he was getting into the car, what was the statement that he made--it's sort of unclear on the tape--as you were putting him into the car about going to the station?

A About whether? I'm sorry.

Q What did -- Did he ask you a question, when you were putting him in the car, about the station?

A If we were going to give him a ride to the station. I said, yes, we'd give him a ride.

MS. BELL: That's all I have for this witness.

THE COURT: Thank you.

Ms. Hall, you may ask questions of the witness.

MS. HALL: Thank you.

CROSS-EXAMINATION

BY MS. HALL:

Q So when you arrived, Mr. Tabbada and Ashly were the only two people there?

A Correct.

Q And Ashly immediately pointed out Mr. Tabbada as the man she accused of touching her?

A Correct.

Q And you had Mr. Tabbada step towards the center of the room?

A Yes, I did.

Q And one of the first questions you asked him

was, "Why would she say something like that?"

A Yes.

Q Now, you talked in your direct examination about why you put the handcuffs on Mr. Tabbada, and you stated that it was because you had concerns of him fleeing.

A Correct.

Q So you were limiting his movement?

A Yes. If he decided to move, yes.

Q Then you wouldn't let him move, right?

A I'm sorry?

Q Then you wouldn't let him move?

A If he had decided he wanted to leave the scene, I would have kept him detained, yes.

Q You would have kept him there?

A Yes.

Q So he had the handcuffs on, and then he asked you at one point, "Can I sit down?"

A Yes.

Q And you told him, "Yeah. Sit right there"?

A Correct.

Q Now, Ms. Bell asked you about when he was looking for his car, and he stepped a few steps away from you to look for the car. He was still in the handcuffs at that point?

A Yes.

Q And he was in handcuffs when he was sitting down on the stoop?

A Yes.

Q And he wore those handcuffs in the patrol car all the way down to the detectives' station?

A Correct.

Q And then, once you were there, he waited in the back of the patrol car?

A For a short time, yes.

Q And he was still in handcuffs in the patrol car?

A Yes.

Q And when he got out of the patrol car, he still had them on?

A Yes.

Q And it was Officer Mayer that took them off?

A Yes.

MS. HALL: I have no further questions.

THE COURT: Thank you.

Ms. Bell, any additional questions?

MS. BELL: Just briefly.

REDIRECT EXAMINATION

BY MS. BELL:

Q How far into the contact was it before you put the handcuffs on him?

A I'm estimating 10 to 15 minutes upon arrival at the scene.

Q And the few steps that Ms. Hall just referenced when he was looking for his car was more like 30 yards, wasn't it?

A Yes. We had to step out into the alley where he said he thought his vehicle was parked so he could see.

MS. BELL: Nothing further.

MS. HALL: Just one question based on that?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MS. HALL:

Q So you walked with him to look for his car?

A Yes.

FURTHER REDIRECT EXAMINATION

BY MS. BELL:

Q Who led?

A I believe we walked side-by-side.

MS. BELL: Nothing further, Judge.

State will call Detective Tone.

THE COURT: All right. Then, Officer, you may be excused.

(Witness excused.)

THE COURT: Detective, if you'll please step right up in this area --

THE WITNESS: I'm sorry. I'm sorry.

THE COURT: -- Ms. Lopez will swear you in.

(The clerk administered the oath.)

THE WITNESS: I do.

THE COURT: Please have a seat in the witness chair.

MICHAEL TONE,

called as a witness on behalf of the State,

first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BELL:

Q Good afternoon, sir. Please state your name and spell it for the record.

A Michael Tone, T-o-n-e.

Q Where are you currently employed?

A With the City of Reno Police Department.

Q In what capacity?

A I'm a detective.

Q In what unit, sir?

A Sex crimes and Child abuse.

Q How long have you been working in that unit?

A Now, approximately a year and a half; just maybe slightly over.

Q What did you do previously to doing that?

A I worked in patrol. I worked in a CAT unit, which is a gang unit.

Q How long have you been employed with law enforcement?

A It will be 16 years in January.

Q Did you get involved in an investigation for an alleged child sexual assault --

A Yes.

Q -- in February, 2001 --

A Yes.

Q -- and regarding Greg Tabbada?

A Yes.

Q And do you see Mr. Tabbada here, present in court?

A Yes, I do.

Q Can you describe where he's seated and what he's wearing.

A He's seated over here at the table with the green shirt, looks like dark pants, black shoes.

MS. BELL: For the record, Judge, Detective Tone has identified Mr. Tabbada.

THE COURT: Yes. The Court will confirm that.

BY MS. BELL:

Q Sir, what was the extent of your investigation with this case?

A I -- Originally, I met Mr. Tabbada, brought him into the building, and then placed him in an interview room, and then I interviewed the victim.

Q Where did you first make contact with Mr. Tabbada?

A Out in the parking lot outside the building.

Q Which building is that?

A It's the Washoe County Professional Building at 1000 East Ninth Street.

Q Is that the corner of Ninth and Wells?

A Yes, it is.

Q Do you recall what time of day it was that you met with Mr. Tabbada?

A It was 6:55 p.m.

Q And when you first saw him --

A Yes.

Q -- where was he?

A When I first made eye contact with him, he was sitting in the back of the patrol car.

Q Did he get out of that car?

A Yes, he did.

Q Did you notice anything about his hands at that

time?

A His hands? His hands were handcuffed.

Q And what did you do when you saw that?

A The officers, we had them take them off.

Q After they took the handcuffs off, did you make speaking contact with Mr. Tabbada?

A Yes, I did.

Q Tell the Court what you said.

A Well, first, I introduced myself as Detective Tone, and I explained to him that he was not under arrest and that he was there voluntarily.

Q What was his response?

A He said, "Okay." Then I asked him if he'd like to go ahead and talk to us.

Q What did he say?

A He said, "Yes."

Q Was his demeanor like, "Well, um, well, yeah"?

A No. Actually, he was very forward and said, yes, he'd like to talk to us, like he was looking forward to it.

Q Did he say, "Well, okay"?

A No.

Q At that point after you said, "Do you want to make a statement to us," did he say anything of substance to you about the case?

A After he told me he wanted to talk to us, he continued, and he made a statement that he didn't rape the little girl, that he doesn't know why she would have said

that.

Q And this all occurred in the parking lot?

A Yes, it did.

Q Now, do you remember what day it was?

A February 13th.

Q Which is a Saturday?

A That, I don't know.

Q Okay. But because the time was 6:55 p.m., would you have been on duty or off duty?

A I was off duty.

Q And do you recall what you were wearing on that day?

A Right at this hand, no, I don't.

Q Do you recall whether you were wearing a uniform, professional or casual clothes?

A I was probably in casual clothing.

Q Would you have been in a police uniform?

A No.

Q At that point, after Mr. Tabbada made those statements to you, where did you go, if anywhere?

A We walked into the building.

Q Describe the building for the Court, please.

A Okay. It's a large building that has different lettered portions to it. We're in Building B, as in boy. We went to the back entrance. We walked across the parking lot, went through the back door. Once we went through the door, there's a secondary door, and our office is right off to the right.

Again, there's one more door that we go through,

and then the interview rooms are off to the left, and Mr. Tabbada, I escorted him into the interview room there.

Q Detective, how many signs are posted in that area that say this is the Reno Police Department?

A There's none.

Q How many badges or items of indicia of a police department are present?

A None that I can think of.

Q Are there uniformed police officers walking around?

A No. The only uniformed officers that were there at the time were Officers Parker and Mayer.

MS. BELL: Judge, at this time may I approach the witness?

THE COURT: Yes, you may.

BY MS. BELL:

Q Sir, I'm showing you what's been marked for identification as State's Exhibit 2 -- 2.1 through 2.6. I'd ask you to take a look at them, if you will, and tell me if you can recognize what it is that's depicted in that picture.

A This is the entrance that we use in order to get into our office.

Q If I could have you turn around and read into the record -- turn the photo around and, for the record, say what exhibit it is, and then tell me what it is.

A This is Exhibit 2.6, and this is a picture of the outside -- or the north side of the building from the parking lot looking towards the building. You can see the brown door where we enter into.

Q What does the sign say, or what are the words that --

A Well, there's a B, for the building number, and then it says "Social Services."

Q Is that the entrance you took Mr. Tabbada in?

A Yes.

Q What is the next picture, sir?

A The next picture is our first interview room. This is the interview room that Mr. Tabbada was placed in. He sat in a different chair than the two that are sitting here.

That's Exhibit --

Q This is Exhibit 2.1. In that picture are you able to see whether or not a camera is visible?

A Yes.

Q Is there audio equipment that's also visible?

A There's audio equipment in the room. I don't know if he would have seen it or not.

Q Is it hidden in the room?

A It's not hidden. It's small.

Q What is the next one?

A This is Exhibit 2.2. I'm not quite sure what that is. I don't recognize that computer.

Q Okay. I'll keep that one.

The next one?

A This would be Exhibit 2.3. That is a wooden door with a sign on it, and this possibly could be one of the doors to the interview rooms.

Q Does it look like the door to the interview room?

A It could. That's what they kind of look like, but I can't be for sure.

This is Exhibit 2.4. Okay. This is an entrance from -- going into our office from the door from the outside. Not from the outside of the building, because there's a few doors we go through before we get into our office. This is from the door leading into our office. I recognize the pencil sharpener and also recognize the door to the left interview room.

Q Not the best quality photograph, but you're able to see that in the picture?

A Yes.

This is Exhibit 2.5. Okay. This is entering through the second series of doors from that first picture from the outside door. Our offices would be located off to the right, and Social Services' offices would be straight forward.

Q Now, why is it that the Reno Police Department, if you know, has moved its -- that unit next to the Social Services' building?

A Because it's a joint task force in which the idea was to make interviews on victims much easier. We could work together without having to interview a person over and over and over again. It makes it easier for the victim, plus it makes it more realistic for us, because we found that if victims continue to tell a story over and over, it gets to be rehearsed.

Q Tell, Detective Tone, when you walked with the Defendant into that room, were you leading him in any way with -- physically, with your arm?

A No.

Q Where was he in relation to where you were?

A He was standing beside me.

Q And walking beside you?

A Yes. I held the door open for him, let him walk in first, and I walked in behind him. I just escorted him in.

Q Where did you take him once you went inside?

A Well, once we were inside, I said, "Go right on inside here. We'll use this room here." And that was the first interview room.

He sat down. I asked if he would like a glass of water. I asked if he was comfortable.

He said he was.

Q Did you get him a glass of water?

A I think I did.

MS. BELL: Nothing further.

THE COURT: Ms. Hall?

MS. HALL: Thank you, your Honor.

CROSS-EXAMINATION

BY MS. HALL:

Q When you first spoke to Mr. Tabbada, you identified yourself as police, correct?

A Yes, as a detective.

Q Yes, sorry.

So he knew that you were a detective for the Reno Police Department?

A Yes.

Q And you testified on direct that you brought

him into the building?

A I asked -- Yeah, I told him, "Let's go inside the building. We'll -- "

Q You said a few minutes ago you escorted him into the interview room.

A Well, I was showing him which way to go, yes. I'm the only one that knew how to get through the building, so basically everybody followed me.

Q The question was: You said earlier, on direct, you escorted him into the interview room.

A We walked side-to-side, yes; side-by-side.

Q Now, when he was questioned, it wasn't at his home, was it?

A By me?

Q Sure.

A No.

Q You weren't at the Wonder Street address, were you?

A No.

Q This wasn't the mall, was it?

A No.

Q It's interview rooms used to question suspects?

A That's what we use the interview rooms for, to question victims and suspects.

Q That's where he was?

A Yes.

Q Correct. And these rooms have cameras --

A Yes.

Q -- to monitor the suspect?

A To video and audiotape our interviews.

Q So that you can preserve whatever they say?

A To assist us in our interviews in case we ever have to refer back to them for court purposes, whatever it may be.

Q So it's preserved for you?

A Sure.

Q And you can also monitor people in the rooms through those video cameras?

A Yes.

Q How many interview rooms are there at this station?

A There's two.

MS. HALL: Nothing further.

Thank you.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MS. BELL:

Q On that same night about that same time, was the victim, Ashly, also there being interviewed.

A She came in, yes; after the fact.

Q And where was she interviewed?

A She was interviewed in the other room next to it.

MS. BELL: Nothing further.

MS. HALL: One more.

RECROSS-EXAMINATION

BY MS. HALL:

Q In the room that Ashly was in, what else is in that room?

A Well, there's -- It's very -- We have a table with two chairs, and the chair that she would sit in, behind it there's a book case that has various -- well, various books and subjects that we work with. There's some stuffed animals. On the other side was a computer desk, plus we have a tracking system and a TV, so -- with dual type video recorder where we are able to copy tapes.

We also have a camera up there, and there's a sound system in there somewhere. I don't know where it's at.

Q Is there also a microwave in that room?

A No. Well, there may be a microwave in there, but it's not plugged in. It's stored -- I think it's stored in the back.

Q What's in the room that Mr. Tabbada was in?

A Filing cabinets, a bookcase, stacks of old newspapers, which -- a bookcase on the side, some coloring crayons. That's probably pretty much it.

MS. HALL: Nothing further.

MS. BELL: Judge, State seeks to admit State's Exhibits 2.1, 2.3, 2.4, 2.5, and 2.6 for this.

THE COURT: Any objection?

MS. HALL: I have no objection to that.

THE COURT: Those are admitted.

(Exhibits 2.1, 2.3, 2.4, 2.5 and 2.6 admitted into evidence.)

THE COURT: I have one question I'd like to clear up from Detective Tone.

This is what I understood your question to be when you led, in essence, other officers and Mr. Tabbada into the building that's noted as Social Services:

You led Mr. Tabbada to an interview room, and then you went to interview Ashly.

Is that correct?

THE WITNESS: Yeah. Ashly wasn't present, yet.

What exactly took place was, we entered into the building. I escorted Mr. Tabbada to the first interview room, which is right inside the door as you walk in, and the interview room is off to the left.

We went in. I asked if he would like water and stuff, and I told him I would be right with him; at which point, I gave him the water and I then went and talked to the officer, and he decided he wanted to go ahead and interview Mr. Tabbada.

And then Ashly arrived shortly after that, and that's when I interviewed her.

THE COURT: So you didn't really interview Mr. Tabbada before you interviewed Ashly?

THE WITNESS: No, no.

THE COURT: Okay.

Do either counsel have questions with regard to my question?

MS. BELL: I do not, Judge.

MS. HALL: No, your Honor.

THE COURT: All right. Then, Detective Tone, you may be excused. Thank you.

THE WITNESS: Thank you, sir.

MS. BELL: State will call Detective Broome.

THE COURT: You know, it might be best just to have a short recess now. We may be mid-way through this proceeding, and it might be a good time for a recess, so we will recess for just a few minutes.

(Break.)

THE COURT: You may be seated.

Ms. Bell, you may again call your witness.

MS. BELL: Thank you.

The State will call Detective Broome.

(The clerk administered the oath.)

THE WITNESS: Yes.

THE COURT: Please have a seat in the witness chair.

TOM BROOME,

called as a witness on behalf of the State,

first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BELL:

Q Good afternoon. Please state your name and spell it for the record.

A Tom Broome, B-r-o-o-m-e.

Q Where do you work, sir?

A The City of Reno Police Department.

Q What do you do there?

A I'm a detective in the sex crimes unit.

Q How long have you been assigned to that unit?

A A little over a year.

Q What did you do prior to that? I guess my

question really is, how long have you been in law enforcement?

A Just short of 21 years.

Q Have you been involved in a number of interrogations and interviews?

A I have.

Q And that's in both custodial and noncustodial settings?

A Yes.

Q Did you become involved in the investigation of a child sexual assault which occurred on Wonder Street February 13th, 2001?

A I did.

Q And that involved an individual by the name of Greg Tabbada?

A It did.

Q Do you see Mr. Tabbada seated here, in the courtroom?

A Yes, I do.

Q Could you describe where he's seated and what he's wearing, please.

A At the defendants' table in the green Pollo shirt.

MS. BELL: Again, Judge, the witness has identified Mr. Tabbada.

THE COURT: The Court will confirm the identification of the Defendant in the case.

BY MS. BELL:

Q What was your role in the investigation of Mr. Tabbada's case?

A I was assigned that week as the on-call sex crimes detective.

Q What does that mean?

A If there was a particular crime that happened after hours that needed to be investigated, then that would fall to the on-call detective.

Q Did this crime occur after hours?

A It did.

Q And you received an on-call page about it?

A Yes.

Q Where were you when you received that page?

A At home.

Q Do you recall what you were wearing at that time?

A Most likely just blue jeans and casual attire.

Q Did you change your clothes before you went down to the police station?

A I did not.

Q What police station did you go down to?

A I didn't really go down to the police station. We have an off-site office up on Ninth Street where we share that with Social Services.

Q Is that where you responded to?

A I did.

Q And wearing the same clothing?

A Yes, ma'am.

Q When you got there, did you make contact with Mr. Tabbada?

A I did.

Q And what was the extent of that initial meeting with him?

A I had first met with the officers and talked to Detective Tone and kind of learned what would -- what they knew, so far, and then met with Mr. Tabbada.

Q When you met with Mr. Tabbada, did you -- was he under arrest at that time?

A He was not.

Q And I mean, had you advised him whether or not he was under arrest?

A When we went into the interview room, we did talk about that.

Q And did you tell him he was not under arrest?

A I told him he was not under arrest, and he was free to leave at any time.

Q Did he appear to understand that?

A He did.

Q And did he even appear to acknowledge that?

A Yes, ma'am.

Q Sir, I'm going to show you what's been marked for identification as State's Exhibit 2.2. I'd like you to take a look at that for me and tell me if you recognize what that is.

A I do.

Q What is that, sir?

A It's a table in one of our two interview rooms.

Q Is that the table from the interview room where Mr. Tabbada is at, or the other one?

A It's the one where I interviewed Mr. Tabbada.

MS. BELL: Move for admission at this time.

THE COURT: Any objection?

MS. HALL: No objection.

THE COURT: 2.2 is admitted.

(Exhibit No. 2.2 was admitted into evidence.)

BY MS. BELL:

Q Did you in fact conduct an interview with Mr. Tabbada?

A Yes, ma'am.

Q How long did that interview take; do you recall?

A About two hours, hour and forty-five minutes.

Q Of actual time of the interview, do you recall -- Did there come a point when the interview ended and the Defendant invoked his rights?

A Yes, ma'am.

Q Do you recall how long -- from start to finish, how long that was?

A I'd say just short of an hour.

Q Was that in fact videotaped?

A Yes, ma'am.

Q Would it be reflected in the videotape the exact time it took?

A It would.

Q Sir, I'm showing you what's been marked for identification as State's Exhibit 3. I'd ask you to take a look at it and tell me if you recognize it.

A I do.

Q What is it?

A This is the original tape from our office of the

interview with Mr. Tabbada.

Q Have you had a chance to review that tape?

A I have.

Q Does it accurately depict everything that occurred at the interview on that day?

A It does.

MS. BELL: Move for admission of State's Exhibit 3 for purposes of this hearing.

MS. HALL: Your Honor, I'd object to the playing of this tape. I think Detective Broome can certainly testify as to the four factors for the Court of the intent for the custodial interrogation, the site of the interrogation, whether the investigation is focused on the subject, whether objective indicia of arrest is present, and the length and form of questioning.

I'll agree as to how long the interview is, excuse me, but I don't believe that sitting here and watching another hour of tape is going to help us determine the answers to the questions that we're supposed to be asking in the test for custodial status.

THE COURT: Is there something on the tape that would be of assistance as to perhaps the issue of the form of the questioning?

MS. BELL: I believe so. Not only that, but I think you need to see the environment, the demeanor of the officers that are involved, the interview room, itself, the length of the detention, the conversational tone of that interview. Those kinds of things do need to be reflected, and I have stipulated previously with counsel that, if there are points that I can fast forward, I will be willing to do

that.

And, Judge, I think that you'd be looking at approximately 40 minutes of videotaped testimony. I do think it's necessary that you do view the videotape, Judge.

THE COURT: Well, I will overrule the objection to the playing of the tape. We do have testimony that states that the tape is authentic, that this is a fair and accurate representation of what went on in the interview, and issues of the form of the questioning and the environment, I think, are relevant to the issue of whether or not Mr. Tabbada was in custody during the course of the interrogation or questioning, so perhaps it's better that I go ahead and view the tape.

MS. BELL: Thank you, Judge. I will start the tape at this time.

(Tape Playing.)

MS. BELL: For the record, that part of the interview was 36 minutes long, and I am now fast-forwarding to the time of 8 minutes and 11 seconds.

(Tape playing.)

MS. BELL: Judge, I think I can stop it at that point. He gets taken into custody, but we don't need to see that.

BY MS. BELL:

Q The only thing: Did you have occasion to watch this tape to the end before you came to court today?

A I believe so, yes.

Q Do you recall the Defendant's statements at the end of the tape as to why he was under arrest?

A I don't.

MS. BELL: Okay. Fair enough.

I have nothing further for this witness, Judge.

THE COURT: Then, Ms. Hall, do you have questions of Detective Broome?

MS. HALL: Yes, I do.

CROSS-EXAMINATION

BY MS. HALL:

Q You've been in law enforcement for 21 years?

A Almost 21 years.

Q Now, you were the primary person that interviewed Mr. Tabbada?

A That's correct.

Q Detective Tone didn't interview Mr. Tabbada. He just took him in the interview --

A No. I believe Detective Tone had a conversation with him outside prior to that. If you'd like to call --

Q But I'm saying, Detective Tone didn't interview him the way you did. Detective Tone just brought him into the interview room.

A That's correct.

Q But you spoke to Detective Tone before you went to question Mr. Tabbada?

A Yes.

Q You talked about the case?

A Sure.

Q What information you both had so far?

A What limited information.

Q What officer Parker had told you?

A Correct.

Q And Officer Mayer?

A I'm -- I'm sure I talked to them.

Q On the tape at 2102, you talked to Mr. Tabbada about examinations, right?

A I'm not sure of the time. I did talk to him about examinations; yes, ma'am.

Q Right. No examinations had been done at that point?

A That's correct.

Q In fact, there were never any examinations on Ashly?

A On Ashly, no.

Q But you told Mr. Tabbada on the tape, "Some things we can tell from examinations"?

A Yes, ma'am.

Q And that wasn't true, was it?

A No. There are some things that we can tell by examinations.

Q But you were talking to Mr. Tabbada about Ashly, right?

A No. About examinations.

Q So that statement, "Some things we know through examinations," had absolutely no reference to Mr. Tabbada and Ashly?

A I disagree.

Q So it did have reference to Mr. Tabbada and Ashly?

A Sure.

Q And you also said to Mr.~Tabbada, "Something

happened, or else you and I wouldn't be talking here today"?

A Yes. I said that.

Q A little farther down in the interview, you talked to Mr.~Tabbada about the scenario of a girlfriend, right?

A Yes, ma'am.

Q And it was your idea that maybe Mr.~Tabbada was thinking about a girlfriend, right?

A That was the scenario I posed to him, yes.

Q And you posed that scenario?

A I did.

Q That was your idea?

A Yes, ma'am.

Q And then you told Mr.~Tabbada, "I can understand that, if you thought it was someone else." True?

A That's what I said.

Q But that's not really true, is it?

A That I could understand what happened?

MS. BELL: Objection, relevance.

MS. HALL: It's very relevant as to the form of questioning if this is deception being used against Mr.~Tabbada, your Honor.

THE COURT: I think it's a fair question. It's certainly relevant, and the objection will be overruled.

BY MS. HALL:

Q So when you told Mr. Tabbada, "I can understand that," meaning, touching Ashly, "if you thought it was somebody else," now that's not true, is it?

A I'm not sure what you're asking. If I, personally, can understand that?

Q Right. That's what you're telling Mr.~Tabbada, that you could understand that if he thought it was someone else.

A That's what I said, yes.

Q That's not really how you feel, is it?

A No, ma'am.

Q Then you told him, again, "It's nderstandable." Right?

A Sure.

Q That's not how you really feel, is it?

A No, it's not.

Q So you were lying to Mr.~Tabbada.

A I was helping him find a way to make him comfortable to talk to me.

Q And that was by telling him something that wasn't true?

A Sure.

Q So then you were lying to Mr.~Tabbada.

A If you like.

Q Well, those are your words, Detective --

A No. Those are your words.

Q -- that I'm quoting back to you. Those are your words that you said to him, right?

A Yes.

MS. HALL: I have nothing further.

THE COURT: Ms. Bell?

BY MS. BELL:

Q When you were telling Mr.~Tabbada, "Some things we know from examinations," were you indicating that there are things that you can tell from examinations when they occur?

A Yes, ma'am.

Q You weren't indicating -- At that point, you didn't have any information about any examinations?

A That's correct.

Q And Ashly had just got there when you basically went in to interview with Mr.~Tabbada, right.

A That's correct.

Q When you left the interview at 8:47 and you said, "You understand everything we talked to," for all intents and purposes, how would you characterize the interview at that point?

A I'm not sure what you're asking.

Q Did you really need to ask him any more questions to know whether or not at that point you had enough evidence to arrest this person?

A Well, I -- I didn't want to say something that you can't take back, so I wanted to meet with Detective Tone, monitor his interview and see if there were any surprises, but I was satisfied with the interview to that point, yes.

Q So even though you came back and said, "You know we would still like to talk to you," you didn't really need to?

A No, ma'am.

Q And for all intents and purposes, it had ended?

A Yes, ma'am.

MS. BELL: Nothing further.

THE COURT: Ms. Hall, do you have any more questions?

MS. HALL: Just briefly.

RECROSS-EXAMINATION

BY MS. HALL:

Q But you did tell Mr.~Tabbada that, "We still want to talk to you further," right?

A Yes.

Q So now you're saying that wasn't true?

A No. I'm not saying that at all.

Q Okay. Then what was -- Did you want to talk to Mr. Tabbada, or did you not?

A I would have clarified some points, but what I believe Ms. Bell was asking was, unnecessary, and it really wasn't. But, sure, I would have clarified points after talking to Detective Tone.

Q So you would have come back and continued by talking to Mr.~Tabbada?

A Sure. If he understood his Miranda rights and waived those, you bet I would have talked to him further.

MS. HALL: Okay. That's what I'm asking.

I have nothing further.

MS. BELL: Nothing further, Judge.

THE COURT: Then, Detective Broome, you may be excused. Thank you.

THE WITNESS: Thank you.

. . .

THE COURT: Thank you.

Well, this is one of the more interesting and "close," I would say, issues with regard to whether or not the Defendant is in custody for purposes of the Miranda warning given.

I think pretty obviously the two things that most stand out that would lead one to conclude that this was a custodial interrogation would be that the Defendant, Mr.~Tabbada, was actually moved from the place he was at to the police station; and, secondarily, he had his wrists restrained with handcuffs shortly before he was placed in the car, and then the handcuffs were removed upon the arrival at the -- I will say the police substation. If nothing else, I think, certainly it amounts to a police substation.

The other issues to look at that would tend perhaps not to lead one to believe that there was an in-custody interrogation. I really don't believe that there were strong-arm or deceptive tactics used by the police in this case. In listening to the testimony of Detective Broome and watching the tape, itself, when Detective Broome made comments to the effect that -- I'm trying to look at my notes here. I have so many different things. That "some things we know from examination," I don't honestly think that Detective Broome was saying that an examination had already been performed and we know something about perhaps penetration of the girl that you must now confess

to. I think only that examination could be performed, and it might reveal something, so I didn't -- I didn't perceive that as deceptive.

Then the other issue: Detective Broome raising the issue that, "Well, if you dosed off and awoke and this girl was next to you, might you have thought that it was some other person in your waking-up stage," and in that manner, apparently Mr.~Tabbada felt more comfortable in discussing his interaction with Ashly, but that isn't the kind of coercive actions or deceptive actions that I would perceive the case law refers to in this type of setting.

We certainly have the issue of Mr.~Tabbada being informed several times by I think two or three officers, three, that this was a voluntary talking to the police and that he was free to go, and I would honestly say that, until he began discussing his conduct with Ashly, later, in the interview, with regard to making physical contact with Ashly and the state of their clothing, et cetera, I don't perceive from all of this evidence that in fact Mr.~Tabbada was going to be kept there and would be arrested. But as Detective Broome states, things have changed as the result of these admissions.

I brought with me to the bench the Taylor case; and, of course, I have all of these cases that have been referred to during the course of the arguments. But, in particular, going to the Taylor case, which is a Nevada fairly recent case, a 1998 case, the court looked to indicia of arrest by looking, it looks to me, like to State versus McKinney where we have this list of factors.

The quote is, "These include whether the suspect

was told that the questioning was voluntary, that he was free to leave, whether the suspect was not formally under arrest, whether the suspect could move about freely during questioning, whether the suspect voluntarily responded to questions, whether the atmosphere of questioning was police dominated, whether the police used strong-arm tactics or deception during the questioning, and whether the police arrested the suspect at the termination of the questioning.

And it also notes that all seven factors need not be present to determine that the suspect was or was not in custody. I've already gone through most of those in fact already.

I think the suspect generally was free to move about during the questioning. The suspect was not formally under arrest. The suspect was told that the questioning was voluntary, that he was free to leave. He voluntarily responded to questions. The atmosphere was less police-dominated than it might have been in that we had detectives who were dressed in civilian clothing, and the place wasn't as formal as a regular police station; but, still, I would have to tilt the balance that the questioning was police-dominated, and definitely they were police officers. Mr.~Tabbada was aware of that. The place was in fact what you might call a substation, even if it was a task-force type of arrangement between the Reno police and the Department of Social Services.

I didn't think that the police used strong-arm tactics or deception during the questioning.

I would say that by the time the initial questioning was over, Mr.~Tabbada would be arrested and in fact was

arrested; wasn't allowed to leave and go home, but he was arrested at the scene.

So this is my ultimate conclusion:

When I look at all of these factors, there are factors certainly going both ways, but in looking at the totality of the circumstances, I cannot say that Mr.~Tabbada was in custody when the statements were made. Even though he had been moved to a different spot and was handcuffed for a while, I don't find that any of these other factors existed, and he was not in handcuffs, obviously, during his time at the -- what I understand is somewhat of a joint facility used by the police and Department of Social Services. The moving appeared to have been voluntary at the scene. From listening to the tape, he certainly volunteered to go to the police station and wasn't coerced to go there, so I am going to deny the Motion To Suppress.

I believe that concludes everything that I would need to do today.

. . .

STATE OF NEVADA)
COUNTY OF WASHOE)ss.

I, DEBBIE P. VIEIRA, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter I was present in Department No. 10 of the above court on Thursday, August 2nd, 2001, at the hour of 8:30 a.m. of said day and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein upon the case of THE STATE OF NEVADA, Plaintiff, vs. GREG RAMBAC TABBADA, Defendant, of the above-entitled action to the best of my skill, knowledge, and ability.

Dated: At Reno, Nevada, this 26th day of February, 2002.

s/Debbie P. Vieiri

Debbie P. Vieira, CCR #351

APPENDIX E

TRANSCRIPT OF INTERVIEW AT CRIME SCENE
WITH GREG TABBADA AND OFFICER PARKER

O = OFFICER PARKER
T = GREG TABBADA

O: Anybody else in this house?
T: No.
O: Okay.
T: (Unintelligible)
O: Okay, stay right there, okay?
T: (Unintelligible)
O: Okay.
T: Too young.
O: Have a seat for me.
T: She's too young. I'm not going to (unintelligible) her, sir.
O: Okay. Why would she say something like that?
T: (Unintelligible) I was tell her to, ah, (unintelligible), ah, step on my back, alright?
O: Step on your back?
T: Yeah.
O: Was this on the couch?
T: The couch was like this.
O: Uh-huh.
T: And then after that she sleep on my back.
O: She did what?
T: She laid down on my back.
O: She laid down on your back?
T: Yeah.
O: Okay. Then what happened?
T: That was it.
O: That was it?
T: That was it.
O: Okay.

T: You thought I was going to rape you?
O: Why don't you go outside with Dougherty here, take her with you. Jim can you interview her, with him?
T: (Unintelligible)
O: Okay.
T: I know she's too young. How can I rape you?
O: Jim, I'll go outside with him.
J: Okay.
O: Do you got your coat there? Is that your coat? Is that your coat?
T: Yes, sir.
O: Okay. We'll go outside for this...
T: No, this is not (unintelligible).
O: This is not yours?
T: No.
O: Do you want a coat?
T: (Unintelligible). Are you going to put me in jail, sir?
O: No. I just need to go outside and talk with you. (To somebody else) Why don't you stay in here and get her information, okay?
T: (Unintelligible).
O: Okay. Do me a favor okay? Just have a seat right here.
T: (Unintelligible)

(Officer talking on radio with dispatch)

O: Have you been arrested before, sir?
T: Yes, sir, I've been in jail for five months.
O: What was that for?
T: Uh.....
O: We're gonna check so just tell me straight up.
T: Yeah.
O: What have you been in jail for.
T: Uh...drugs.
O: Drugs.
T: Yeah.

O: Okay. Have you been doing any drugs tonight?
T: No.
O: Nothing.
T: Nothing (unintelligible).
O: So you're a convicted person.
T: Yes, sir.
O: Have you ever been arrested for any sexual crimes?
T: Uh, no.
O: Nothing?
T: (Unintelligible) the girl.
O: What's that?
T: How can I rape the kid? Too young.
O: Okay. Did you touch her inappropriately or anything like that?
T: No.
O: Nothing? Okay.
T: (Unintelligible), sir.
O: Okay. Why would she say something like that?
T: I don't know.
O: Okay. Are you married?
T: I'm single.
O: Single.
T: Yes, sir.
O: How old are you?
T: Huh?
O: How old are you, sir?
T: Twenty-seven, sir.
O: Twenty-seven?
T: Yeah. (unintelligible).
O: How long have you been babysitting her?
T: Ah...like (unintelligible). The mom (unintelligible).
O: No, is this the first day?
T: Ah, just tonight, yeah.
O: Tonight's the first night?
T: Yeah.
O: Where's the mother at?
T: Uh...they left and they wanted me to stay with her.
O: Where to you live?

T: I live in Sparks.
O: Well how do you know the family here?
T: Ah...a friend of mine.
O: A friend of yours?
T: Yeah.
O: Is a friend of the mother?
T: Ah...the mother.
O: Okay.
Other Officer: (Unintelligible) we're definitely 1095.
O: Okay.
T: If I was I'll tell you the truth.
Other Officer: Do you know her mom's cell phone number?
T: Ah....
Other Officer: Is it written down somewhere?
O: Here, just let us have that. Here, put this back in your pants and I'll hold onto your I.D.
T: (Unintelligible) I didn't do nothing.
O: Okay. We're trying to figure what's going on here. She calls and makes allegations we've gotta listen, okay? So, that's why I'm out here talking to you. I'm not just going to take her side for it, I'm going to get your side of the story and see what happened, okay?
T: (Unintelligible).
O: What's that?
T: I was still at the thing.
O: The application? Okay.
O: Charles 7-7-5-29, white, or hispanic male. Are you hispanic sir?
T: Mmm?
O: Hispanic? Your nationality.
T: Yeah. I'm Filipino.
O: Filipino?
T: Yeah.
O: Okay. Are you ready Reno? Sorry.
Dispatch: Affirmative. Go ahead.
O: Okay. He's actually a Filipino male. It's the last of Tom, Adam, Boy, Boy, Adam, David, Adam. First

of Greg, middle of Robert, Adam, Mary, Boy, Adam, Charles. D-O-B of 10-10-73. Soc. of 530-41-0375 and also Code 9.

Dispatch: 10-4.

O: Okay, so...she uh...

T: If I talk to you I'll tell you the truth sir.

O: Okay. This is the first night you ever babysatted her? Babysat with her?

T: Yeah, I think (unintelligible).

O: Okay. So this is the first night you ever babysat.

T: (Unintelligible).

O: What time did the mother leave here?

T: (Unintelligible).

O: What time did the mother leave?

T: Ah...like twenty minutes ago.

Other Officer: What is the phone number here? There are a bunch of numbers written down and I can't tell what's what.

T: (Unintelligible).

Other Officer: Where? What's the first three numbers?

T: 1, 5, 1, 0. It's a lot (unintelligible).

Other Officer: 1, 5, 1 is the first three numbers?

T: Yeah. No it's four numbers. 1, 5, 1, 0.

O: Probably 5, 7, 0.

T: It's cell phone.

O: (Unintelligible). It's probably 5, 1, 0. What's the last number? The 8, 1.

T: 8, 1, 6, 6, 7.

O: What is it?

T: 8, 1, 6, 6, 7, 2, 3, 2.

Other Officer: (Unintelligible).

O: Oh. Try this 876-7232 and see what you get with that.

Other Officer: Her phone's...

O: Oh, you know what? That's probably a long distance. 5, 1, 0 area code so...yeah, try calling that 876 number first. What's the mother's name?

T: Sabrina.

O: Sabrina? Okay.

Other Officer: Um...there phone apparently doesn't work. It's only for 911's.

O: Oh, okay. Morgan should be here any minute. (Unintelligible).

Other Officer: (Unintelligible). Do you want me out here or...?

O: No. I'd rather you stay with her. That way you can hear any statements and...Okay, why don't you go ahead and stand and I'll put handcuffs on. You're not under arrest, but you're just being detained at this time so turn around for me.

T: (Unintelligible).

O: Okay, we'll we're trying to figure this all out, okay? Stay right there so I can lock these down. So what have you been arrested for?

T: Excuse me, sir?

O: What have you been arrested for?

T: (Unintelligible) drugs.

Other Officer: He says he's got one in the truck (unintelligible).

O: Okay.

T: Can I sit here, sir?

O: You can sit down. So that's not your blue coat in there?

T: Ah, no.

O: It looks like your blue coat.

T: That's not my (unintelligible).

Dispatch: 7-7-5 Reno.

O: 7-7-5.

Dispatch: Your subject's (unintelligible) and your Code 9's pending.

O: 10-4. That's the sergeant that's just pulled up, you'll want to give him a brief. It's Mark Morton.

Other Officer: Is this the boyfriend.

O: This is the babysitter. First night ever babysitting.

Other Officer: Really?

O: Mother left about a half-hour ago.

T: Half-hour ago.
O: Yeah.
T: I'm not going to rape her. Too young.
O: Too young?
T: Yeah. I'm not stupid.
O: You're not stupid?
T: No.
O: What if she's a little bit older then, you would?
T: Yeah.
O: If she was a little bit older you'd be interested?
T: Ah...I don't know about her.
O: Yeah, but you would be interested, huh?
T: Ah...
O: She's kinda cute, huh?
T: (laughing)
O: She's kinda cute?
T: (Unintelligible) too young.
O: She's too young, huh? How old would she have to be?
T: Ah...nineteen.
O: Nineteen, huh? To rape her? She'd have to be nineteen to rape her?
T: (Unintelligible) you know.
O: So when's the last time you were arrested for the drugs?
T: Ah...that was...that was in July.
O: July? Of this year...or of 2000?
T: 2000.
O: Okay. What did you have on you?
T: (Unintelligible).
O: Yeah, tell me the truth. I mean, I can go look it up and...
T: Okay, I got pulled over for baggies.
O: Baggies? Of what?
T: Ah...crank.
O: Crank, okay. Meth. How much did you have?
T: A quarter.
O: A quarter an ounce.

T: No, no, no, just a quarter (unintelligible) baggie.
O: How many baggies?
T: Just one baggie.
O: Just one baggie. And how much was in the baggie.
T: Just a quarter.
O: What was it?
T: A quarter, a quarter.
O: A quarter of a gram?
T: No, not a gram, just a quarter.
O: How much did you pay for it?
T: Actually, they give me their in jail (unintelligible).
O: No, how much did you pay for the dope?
T: Well, somebody gave it to me (unintelligible) somebody gave it to me.
O: Oh, okay.
T: They put me in jail five months. Five months.
Other Officer: What's your name, partner?
T: Uh...Greg.
Other Officer: Greg? I'm Sergeant Mark Morton with the Reno Police Department.
T: (Unintelligible).
Other Officer: Okay, this girl's taken some action (unintelligible) against you, okay?
T: (Unintelligible).
Other Officer: (Unintelligible). Let me ask you this one question, okay, cause mom's not here and...
T: (Unintelligible).
Other Officer: That's understandable. I understand where you're coming from. Would you go down to the station and talk to a detective tonight before this ah...
T: What time. Right now?
Other Officer: Right now.
T: (Unintelligible).
Other Officer: Reno Police Department.
T: Reno Police Department.
Other Officer: Yeah. You understand the mom's not here, okay. (Unintelligible) without the mom so I need

your help.

T: Okay.

Other Officer: Okay? Thank you.

T: (Unintelligible).

O: I'm sorry I didn't hear you.

T: (Unintelligible) last night.

O: Last night what?

T: Uh...babysitter.

O: Babysitting?

T: Yeah.

T: (Unintelligible).

O: What's that?

T: (Unintelligible).

O: Close at 9? No we're open 24 hours.

T: (Unintelligible). Too tight.

O: We can loosen them up a little bit for you.

T: (Unintelligible).

O: What's that?

T: (Unintelligible) a good day.

O: It's a good day. Winter's almost over.

T: (Unintelligible).

O: Well, you're not under arrest so you're just being detained right now and the sergeant just asked if you'd voluntarily go down to the station and talk to the detective about what happened, give your side of it. If you want to write a statement, you can. Is that what you...

T: (Unintelligible) can write English.

O: Or you can write it in Spanish or do you write any language. Can you write at all?

T: I don't...no.

O: Okay. But you can talk okay so he can just take a verbal statement from you. Is that okay?

T: Sure.

O: So, did you wear a coat over here?

T: Um...(unintelligible) in my car.

O: It's in your car? Is this your car?

T: No.

O: Where's your car at? What kind of car do you have?
T: A white one.
O: Where'd you park it? You can stand up. Is your car down here? Cause I don't see it. Or is that it?
T: Oh, you know what sir? I'm sorry. The mother used my car.
O: What's that? The mother drove your car.
T: Yeah.
O: Oh, okay.
T: I'm sorry.
O: That's okay. Okay, go ahead and have a seat. So who's blue coat is that in there?
T: It's...ah...the boyfriend.
O: The boyfriend's? What's his name?
T: Rick.
O: Rick? Okay. And you're Greg right? And the mother's name is Sabrina?
T: Sabrina.
O: Okay. What kind of car do you drive?
T: It's a (unintelligible).
O: A white Oldsmobile? Four door or two door?
T: Two door.
O: What year is it?
T: (Unintelligible).
O: Okay. California or Nevada license.
T: Nevada.
O: Okay. Where do you live out in Sparks.
T: Do you know where Sullivan?
O: On Sullivan? What's the number that you live there.
T: 2280.
O: 2280?
T: Pauline.
O: Pollen?
T: P-a-u-l-i-n-e. Pauline.
O: How do you spell it again?
T: P-A-U
O: B, as in boy?
T: P

O: P, as in Paul? P-A-U...
T: P-A-U-L-I-N-E.
O: Pauline?
T: Pauline.
O: Pauline.
T: Pauline.
O: Okay. And that's 2280?
T: Yeah.
O: Pauline?
T: Pauline. (Unintelligible).
O: Is it an apartment or is it a...
T: A house.
O: A house. 2280. Who do you live there with?
T: My parents.
O: Your parents? Anybody else? No other sisters?
T: Yeah. (Unintelligible).
O: Your brothers and sisters live there?
T: (Unintelligible).
O: Okay. How many people live in this house?
T: (Unintelligible) one, two...six.
O: Six? Okay.
T: (Unintelligible) seven including the kid.
O: Okay.
T: (Unintelligible).
O: Okay. He's, uh, probably going to go down to the East Ninth Street (unintelligible). It being a nine-year old girl and stuff he's just going to talk to you, okay? Alright? (Unintelligible) to understand this stuff.
T: (Unintelligible).
Other Officer: Do you need a coat?
T: No, it's okay. If this is (unintelligible) I'll tell the (unintelligible) that it's not true.
Other Officer: Okay, okay, alright.
T: (Unintelligible) I make mistakes.
Other Officer: How old are you?
T: Twenty-seven.
Other Officer: Twenty-seven. Okay, good. And I'm going

to go talk to these guys. I think (unintelligible).

O: Right. Okay. Okay, why don't...yeah, let's tell you, I'll put you in the car so you can stay warm.

T: Yeah.

O: And I'll come in and talk to you.

T: Can you give me a ride to the (unintelligible).

O: Yeah, we'll give you a ride. I've just gotta find the key.

Other Officer: (Unintelligible).

T: (Unintelligible). No.

O: Do you know what time they're going to be back?

T: I don't know.

O: They didn't tell you what time?

T: No.

O: Okay, I'm just going to search you again before I put you in there, okay, so go ahead and spread your feet again for me. Do you have anything on you that's going to poke me or stick me?

T: No, no.

O: Needles or anything like that?

T: I'm a (unintelligible).

O: Okay. Now how could she have the car if you've got the keys?

T: That's a different (unintelligible).

O: It's a different key? More keys. You've got a lot of keys.

T: Coins too.

O: Oh, there's coins.

T: Yeah. (Unintelligible).

O: Smoke Marlboro's, huh?

T: Yeah.

Unidentified person: (Unintelligible).

O: Yeah, everything's fine.

Unidentified person: (Unintelligible).

O: Ah, just a misunderstanding. No big deal. Thank you, though. Is that Chapstick?

T: Uh-huh.

O: Okay. Why don't you have a seat there for me.

T: (Unintelligible).

O: Well, right down here, buddy, crack of your butt, put your hands all the way down underneath there, there's a cut out there for them. Feel it? Okay, now you can lean back. Can you lean back? There you go.

T: (Unintelligible).

O: There we go. Okay, I'll be right back.

Unidentified person: (Unintelligible).

O: Well, I can't really talk about it right now.

Unidentified person: Okay.

O: But, the little girl in there, she's okay. Do you know the mother over here at all?

Unidentified person: No. I, actually, I see a lot of people come and go, but I don't know exactly who it is that lives there.

O: Okay. Yeah, there's a little nine-year old girl that called us.

Unidentified person: Really.

O: But I can't really talk about the case right now.

Unidentified person: Okay, yeah. (Unintelligible).

O: Yeah, your house and all that's fine, you know.

Unidentified person: (Unintelligible).

O: Okay.

Dispatch: (Unintelligible) 7-7-5.

O: Go ahead.

Dispatch: (Unintelligible).

O: 7-7-5 (unintelligible).

Dispatch: 7-7-5 just be advised your (unintelligible) has no Code 9 information.

O: Thank you.

Other Officer: (Unintelligible) camera?

O: Yeah, I have Polaroid and 35.

Other Officer: (Unintelligible).

O: No, I think this is his, but he won't admit to it.

Other Officer: (Unintelligible) a crime scene record.

O: Okay.

Other Officer: (Unintelligible).

O: What did she say? He told me, this is what he told me. He said he was laying down on the couch and he had her walk on his back and then she laid down and fell asleep on him while he was (unintelligible).

Other Officer: (Unintelligible) he had a hard on, (unintelligible).

O: Okay.

Other Officer: (Unintelligible) and it sounds like she's (unintelligible).

O: He says he spoke once to David so maybe the girl can tell us. But you know he's making statements like "she's too young to rape" and then he's saying she would have to be older and I go "to rape?" and he goes "yeah." And then I go "well how old would they have to be for your rape them?" And he goes "nineteen," but I'm not sure how well he understands the English language.

O: (Unintelligible) belong to the boyfriend.

T: Yeah. (Unintelligible).

O: Okay. Is this your car down here?

T: No.

O: It's not your car? That one right there.

T: Nope.

O: Okay.

Other Officer: (Unintelligible).

O: Ah, no I don't, you know, maybe Dougherty will.

Other Officer: (Unintelligible) traffic guy.

O: Yeah, he should have it. I keep meaning to ask in evidence and I keep forgetting. Do you have one?

Other Officer: (Unintelligible).

O: I'm going to pack this up. (Unintelligible). Where was that? In his door panel?

Other Officer: It was in the middle.

O: Okay. It's unlocked. Hey Dan?

Other Officer: Yeah.

O: You got his key?

Other Officer: Yeah.

O: Well I say we're probably gonna be, ah,

(unintelligible) for service tonight since we're getting out of here at 10:30.

Other Officer: (Unintelligible).

O: Yeah, it's gonna be empty. Want me to load it for you? I'll show you how. They're all a little different each time and that's a brand new one so...

(This is NOT a certified transcript. Although every effort has been made to ensure accuracy you need to refer to the original or a copy of the source audio/video tape.)

APPENDIX F

(This is NOT a certified transcript. Although every effort has been made to ensure accuracy you need to refer to the original or a copy of the source audio/video tape.)

RENO POLICE DEPARTMENT
TRANSCRIPT

CASE # 50592-01

1. PERSON GIVING STATEMENT: GREG RAMBEC TABBADA
   SEX/RACE/DOB: M/FILIPINO/10/10/73
   SOCIAL SECURITY NUMBER: 530-41-0375

2. RESIDENCE ADDRESS: 4280 PAULINE
   SPARKS, NEVADA
   356-7299
3. EMPLOYMENT: UNEMPLOYED
4. TAKEN BY: DETECTIVE BROOME
5. ON: UNKNOWN FROM: UNKNOWN
   TO: UNKNOWN
6. IN THE PRESENCE OF: NO OTHER PERSONS PRESENT

GREG TABBADA:	..yeah..
DETECTIVE BROOME:	Okay, your free to leave if you want. The doors just shut to give us a little privacy.
GREG TABBADA:	(inaudible..) kids or..
DETECTIVE BROOME:	Okay, well we'll talk about it

that's...

GREG TABBADA: (laughs)

DETECTIVE BROOME: Okay?

GREG TABBADA: If I was I would tell you the truth but...

DETECTIVE BROOME: ..Okay, and we'll talk about all that. I just want you to know that, make sure you understand that your here uh..voluntarily, okay. How do you say your last name?

GREG TAPBADA: Tabada.

DETECTIVE BROOME: ..Tabada?

. . .

DETECTIVE BROOME: Okay, do you understand everything that you and I have talked about?

GREG TABBADA: Yeah.

DETECTIVE BROOME: Okay, alright, just sit still for just a few minutes I'll come right back, okay?

(door opens and closes). (long period of silence) (knocking at door) (door opens) (door closes) (long period of silence) (Talking in background inaudible..) (long period of silence) (door opens and closes)

DETECTIVE BROOME: Sorry. Greg there..there's a kind of a test we'd like to do with your permission, okay? We'd

like to have some people come and they'll take some pictures of you, okay? Um..they will scrape your..take some..scrape your fingernails and stuff like that, is that okay with you?

GREG TABBADA: (inaudible..) sir, (inaudible..)

DETECTIVE BROOME: Huh?

GREG TABBADA: I"m going..going..got to go pick up my sister.

DETECTIVE BROOME: Okay, well you know what you can..you know what you did. Okay?

GREG TABBADA: Is..is..I'm not done yet?

DETECTIVE BROOME: But your not done yet, okay.

GREG TABBADA: Sure.

DETECTIVE BROOME: Okay? Is that okay?

GREG TABBADA: Sure.

DETECTIVE BROOME: Just a couple of things I want to clear up here, okay? I'm glad you've been honest with me okay?

GREG TABBADA: Oh, I'm honest with you sir.

DETECTIVE BROOME: It..it's important that..that you be honest with me, okay? And I'm glad you've been honest with me.

GREG TABBADA: What's your name?

DETECTIVE BROOME: It..it..it's Broome, just like you sweep with.

GREG TABBADA: Oh, okay.

DETECTIVE BROOME: Just like you sweep with, okay?

GREG TABBADA: Yeah, I can see the..see..

DETECTIVE BROOME: ..now what you did was wrong, do you understand that?

GREG TABBADA: (No audible response)

DETECTIVE BROOME: Okay, and your going to be..your gonna..your under arrest for that. Okay?

GREG TABBADA: (No audible response)

DETECTIVE BROOME: Do you understand?

GREG TABBADA: Yeah, it's not gonna happen..

DETECTIVE BROOME: What?

GREG TABBADA: ..it's not going to happen again see.

DETECTIVE BROOME: Okay, well I'm..I'm glad it's not going to happen again, but your going to have to go to jail for what happened tonight. Okay? Do you understand that?

GREG TABBADA: (inaudible..) please give me a (inaudible..) I've been there already.

DETECTIVE BROOME: I know but it's going to have to go to court, okay? It's going to have to go to court.

GREG TABBADA: Oh.

DETECTIVE BROOME: ..but your going to have to go to jail for what happened tonight. Do you understand that?

. . .

(2)

FILED
JUN 2 - 2004
OFFICE OF THE CLERK

No. 03-799

In The

Supreme Court of the United States

THE STATE OF NEVADA,

Petitioner,

v.

GREG R. TABBADA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE[1]

The following facts are in addition to those stated in the Petition:

When the police arrived on scene, Tabbada was sitting on a couch. Appendix D-3. Officer Parker had Tabbada stand up and moved Tabbada to the center of the room. Appendix D-4. Tabbada asked if he was going to jail. Appendix E-2. Officer Parker responded, "No. I just need to go outside and talk with you." *Id.* Officer Parker had Tabbada go outside with him and had Tabbada sit on the porch. Appendix D-5.

Approximately 15 minutes later, Officer Parker had Tabbada stand and proceeded to place him into handcuffs. Appendix D-5, E-6. Officer Parker told Tabbada he was not under arrest but that he was being detained. Appendix E-6. Officer Parker did not tell Tabbada why he was being detained. *Id.* Per Officer Parker, Tabbada was not free to leave. Appendix D-10.

Officer Parker interrogated Tabbada. Appendix E-6-8. Sergeant Morton approached Tabbada and asked if he would be willing to go to the station to talk to a detective. Appendix E-8. Tabbada responded, "What time? Right now?" *Id.* Sergeant Morton said, "Yeah. You understand the mom's not here, okay. (Unintelligible) without the mom so I need your help. Okay?" Appendix E-8-9. Tabbada responded, "Okay." Appendix E-9.

---

[1] For the purposes of this brief, Respondent adopts Appendixes A-F of the Petition.

Officer Parker placed Tabbada into a police car. Appendix D-7-8, Appendix E-12. Officer Parker told a fellow officer, "I'm not sure how well he (Tabbada) understands the English language." Appendix E-14.

REASONS FOR DENYING THE WRIT

I

In reaching its conclusion that Tabbada was in custody the moment he was handcuffed, the Nevada Supreme Court utilized the test set out in *Berkemer v. McCarty*, 468 U.S. 420, 422 (1994), i.e., "how a reasonable man in the suspect's position would have understood his situation." Appendix A-3, quoting *Alward v. State*, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 422 (1994)).

The Petitioner requests that the Court give further definition to this rule by requiring courts to view the totality of the circumstances when faced with a custody issue, with no one factor being controlling. Petition, 6. The Nevada Supreme Court already adopted such a rule, *Alward v. State*, 112 Nev. 141, 912 P.2d 243 (1996), and applied the rule to Tabbada's circumstances. Appendix A-3-4.

The Petitioner's problem is not the rule itself but rather the manner in which the rule was applied by the Nevada Supreme Court. Specifically, the Petitioner takes issue with the weight applied by the Nevada Supreme Court to the fact that the defendant was handcuffed without justification. Petition, 7. A petition for writ of certiorari is "rarely granted" where the alleged error

consists of "the misapplication of a properly stated rule of law," United States Supreme Court Rule 10. In any event, the Nevada Supreme Court did not misapply the rule as the Court properly weighed the totality of the circumstances in reaching its conclusion that Tabbada was in custody.

II

The second issue presented in the Petition has never been addressed by this Court: whether the custodial status of a suspect may revert to non-custodial status for the purpose of *Miranda* and, if so, under what circumstances. For the following reason the Petition should be denied as to this issue.

The Petition states that "the Nevada Supreme Court has erred by ruling that a defendant's custodial status may not evolve into a non-custodial status." Petition, 8. By stating skepticism that transformation from custodial to non-custodial status "can so readily occur," Appendix A-7, however, the Nevada Supreme Court did not rule that custodial status can never evolve to non-custodial status. *Id.*

In this case, the Nevada Supreme Court viewed the totality of the circumstances and cited specific facts in correctly concluding that Tabbada's custodial status did not evolve into non-custodial status. Appendix A-8. The Petitioner takes issue with the factual findings of the Nevada Supreme Court, Petition, 11-12, but a petition for certiorari is "rarely granted when the asserted error consists of erroneous factual findings . . . " United States Supreme Court Rule 10.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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